FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
NAGPUR BENCH, NAGPUR

Second Appeal No. 268/2005
(Ramdas Anand Sohurkar & 3 ors. VERSUS Sau. Kaminibai Prabhakar Kamble)

Appeal	District :
Application No.	of 200
Writ petition	

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's orders

Ms. Tiwari h/f Mr. A.S. Mardikar, Adv. for the appellants.

CORAM : Smt. Vasanti A. Naik, J.
DATED : 17th August, 2007.

Heard Ms. Tiwari for the appellants.

The appellants are the original defendants. A suit was filed by the plaintiff Kaminibai for partition and separate possession of her share in the suit property. It was the case of the plaintiff that one Ananda owned and possessed the field properties and had three wives; namely, Bainabai, Watsalabai and Mathurabai. Bainabai had one son named Datta and the defendant nos. 2, 3 and 4 are the legal heirs of deceased Datta. Defendant no.1 Ramdas is the son of Watsalabai. The plaintiff claimed to be the daughter of Mathurabai, the third wife of Ananda. According to the plaintiff, the plaintiff and the defendants were the only legal heirs of deceased Ananda and, therefore, the plaintiff had 1/3rd share in the suit property. Since the defendants refused to partition the suit

properties and give the separate share to the plaintiff, the plaintiff instituted the present suit.

The defendants filed their written statement and denied the claim of the plaintiff. It was pleaded by the defendants that Ananda had only two wives; namely Bainabai and Watsalabai. It was denied that the plaintiff was the daughter of Mathurabai. It was further denied that Mathurabai was married to Ananda. It was pleaded by the defendants that they became the owner of the suit properties by adverse possession. Lastly, it was pleaded that the suit was barred by limitation.

On the aforesaid pleadings of the parties, the trial Court framed the issues and held that the plaintiff proved that she was the daughter of Ananda from Mathurabai. The trial Court further held that the plaintiff had 1/3rd share, defendant no. 1 had 1/3rd share and the defendant nos. 2 to 4 had 1/3rd share in the suit properties. The Court held that the suit property was the ancestral property and the defendants had failed to prove that they had become owners of the suit properties by adverse possession. The Court also held that the suit was not barred by the provisions of Limitation Act. The defendants preferred appeal before the Additional District Judge, Washim. The first appellate Court confirmed the findings recorded by the trial Court on all the issues except the issue

which dealt with the extent of share of the plaintiff in the suit property. The first appellate Court has held that the plaintiff had only 3/25th share in the suit property and not 1/3rd share in the suit property as held by the trial Court. The judgments passed by both the Courts are challenged in this second appeal.

The learned counsel for the appellants raised two grounds in this second appeal. According to the learned counsel for the appellants, the Courts were not justified in applying the provisions of Section 8 of the Hindu Succession Act, 1956 retrospectively to the facts of the case. It was the case of the appellants that Ananda died in the year 1951 and after the death of Ananda only male heirs i.e. Ramdas and Datta could have inherited the suit properties as per the old Hindu Law. It was canvassed on behalf of the appellants that the daughters of Ananda would not have claimed any share in the suit properties as Hindu Succession Act came into force in the year 1956 and Ananda had died in the year 1951. The counsel for the appellants then submitted that a female could not have sought partition and possession of the house properties in view of the provisions of Section 23 of the Hindu Succession Act. It was also submitted on behalf of the appellants that the suit filed by the plaintiff was barred by the provisions of the

Limitation Act.

I have perused both the judgments. A perusal of appellate Court's judgment shows that the first appellate Court has not applied the provisions of Section 8 of the Hindu Succession Act to the facts of the case. The appellate Court, in fact, reversed the decree passed by the trial Court so far as it granted 1/3rd share to the plaintiff. The first appellate Court did not rely on the provisions of Section 8 of the Hindu Succession Act and in fact, held that there was a notional partition at the time of death of Ananda in the year 1951, as a result of which Ananda would have got one share in the suit properties, second share would have gone to his three wives and one share each would have gone to Mahadeo, Gajanan, and Ramdas. After the death of Ananda, his 1/5th share would go to all five members of family i.e. Anusaya, Mahadeo, Gajanan, Ramdas and Kamini. Thus, the shares of Mahadeo, Gajanan and Ramdas became 1/5th + 1/25th each and Anusaya and Kamini each would get 1/25th share each. The first appellate Court, therefore, did not carve out the share of the daughters on the death of Ananda as canvassed by the counsel for the appellants. The first appellate Court, in effect, applied the provisions of the Hindu Women's Right to Property Act 1937, as Ananda died in the year 1951. In view of Section 3 of the Hindu Women's

Right to Property Act, 1937, all the widows of Ananda together could take one share in the suit properties and the sons of Ananda could take one share each in the suit property. The appellate Court, therefore, did not grant 1/3rd share to plaintiff Kamini, as granted by the trial Court by applying the provisions of Section 8 of the Hindu Succession Act. The first submission raised on behalf of the appellants, is, therefore, liable to be rejected.

The second submission made on behalf of the appellants about the applicability of the provisions of Section 23 of the Hindu Succession Act, is liable to be rejected for the reasons that in view of recent amendment to the Succession Act, 1956, Section 23 has been omitted. A female heir is, therefore, entitled to claim partition and separate share in the residential house property also. The submissions on behalf of the appellants that the defendants had perfected their title to the suit properties by adverse possession is also not acceptable as the trial and the appellate Courts have rightly considered that the defendants had denied that the plaintiff was the daughter of Ananda and Mathurabai was third wife of Ananda. When the defendants had disputed the ownership of the plaintiff over the suit property, a plea of adverse possession of the property could not have been raised.

Both the Courts have rightly recorded a finding that the claim of the plaintiff was not barred by limitation as the revenue records never showed that the property was ever partitioned and properties were not recorded separately in the names of the members of the family of Ananda. Even otherwise, the trial and the appellate Courts have recorded a finding of fact that the suit was filed within 12 years from the date of seeking a partition and separate possession of her share by the plaintiff.

Hence for the reasons aforesaid, it is clear that no substantial question of law arises for consideration in this second appeal. Second appeal is, therefore, dismissed with no order as to costs.

JUDGE

RMP